

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 30/03

INSTITUTE FOR SECURITY STUDIES

Applicant

in re:

THE STATE

versus

BASSON

Heard on : 1 December 2004

Decided on : 2 December 2004

Reasons delivered on: 9 September 2005

JUDGMENT

THE COURT

Introduction

[1] This judgment deals with the application for admission as amicus curiae by the Institute for Securities Studies (ISS). The ISS applied for admission as an amicus in these proceedings. The state gave the necessary consent while Dr Basson, the respondent, declined to do so. The ISS subsequently applied to the Chief Justice for admission as amicus curiae. The application was opposed by the respondent. After

hearing argument on 1 December 2004, the Court refused the application and intimated that it would furnish its reasons later. These are the reasons.

Background

[2] The ISS is a research organisation which is concerned with human security in Africa. It conducts research and engages in advocacy on matters concerning human security debate in Africa. It has an interest in international criminal law. The ISS sought to make submissions on three aspects, namely, the role and place of crimes against humanity in the context of the history of South Africa; the correctness or otherwise of the dismissal of the charges relating to conspiracy; and the extraterritorial reach of the constitutional duty to prosecute international crimes. The ISS did not however suggest that it would raise new matters.

[3] Based on its research and ongoing work in the areas relating to the implementation of the Rome Statute of the International Criminal Court in South Africa, and in Africa, in general, and in particular in relation to war crimes, crimes against humanity, the ISS alleged that it would provide a different perspective on the issues before this Court. It alleged that its argument would differ in that it would address among other issues, the history of individual criminal responsibility under international law, the history of the duty to prosecute crimes against humanity and war crimes, the legal and political consequences for failure by South Africa to prosecute and punish international crimes, amnesty for international crimes and the extra-

territorial effect of amnesties such as that granted by the Administrator-General of Namibia.

[4] The respondent did not oppose the application “in principle”. He took the point that the issues relating to the quashing of the charges were not before this Court because (a) they were abandoned by the state and (b) the SCA refused an application for condonation which sought to raise these issues. In argument in this Court, the respondent also submitted that the issues sought to be canvassed by the ISS had been canvassed by the state in its written submissions.

The applicable legal principles

[5] Applications for admission of amici are governed by rule 10. That rule provides:

“(1) Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).

(2) The written consent referred to in subrule (1) shall, within five days of it having been obtained, be lodged with the Registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

(3) The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).

(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant

such application upon such terms and conditions and with such rights and privileges as he or she may determine.

(5) If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.

(6) An application to be admitted as an amicus curiae shall-

- (a) briefly describe the interest of the amicus curiae in the proceedings;
- (b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and
- (c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

(7) An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

(8) Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.

(9) An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.

(10) An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.

(11) The provisions of rule 1(3) shall be applicable, with such modifications as may be necessary, to an amicus curiae.”

[6] It might be thought from a reading of subrules 10(1) and (4) that a person may be admitted as an amicus either on the basis of the written consent of all the parties in the proceedings or on the basis of an application addressed to the Chief Justice.¹ This,

¹ *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at para 3.

however, is not the case. An amicus is a friend of the court and no person may be admitted as an amicus without the consent contemplated in subrule 10(4). That subrule provides that “. . . any person may, with the written consent of all the parties . . . be admitted . . . as an amicus curiae.” The footing on which the amicus is heard is that the person will offer submissions on law or relevant facts which will assist the Court in a way in which the Court would otherwise not have been assisted. Thus subrule 10(3) makes provision for the amendment of the terms, conditions, rights and privileges that may have been agreed upon by the parties.

[7] In the exercise of its discretion whether or not to admit a person as an amicus this Court will have regard to the principles that govern the admission of an amicus. These principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties. As subrule 10(7) indicates, the submission should raise new contentions and should “not repeat any matter set forth in the argument of the other parties.” It is the duty of this Court, in the exercise of its discretion to ensure that these principles are satisfied before a person can be admitted as an amicus. Where these principles are not satisfied, a person cannot be admitted as an amicus. It follows therefore that this Court is not bound to admit a person who has obtained written consent of all the parties. This Court may refuse to admit such a person where the underlying principles referred to above are not satisfied. Nor does the fact that a person was admitted as an amicus curiae in the court below matter.

[8] It is true that subrule 10(2) read with subrule 10(4) may appear to be suggesting that a person who has obtained a written consent contemplated in subrule 10(1), need not make an application for admission as an amicus. These subrules must be read in the light of rule 10 as a whole, in particular, the underlining principles governing the admission of an amicus. As pointed out above, this Court has a discretion whether or not to admit a person as an amicus and that discretion must be exercised in the light of the principles that govern the admission of an amicus. The fact that a person has obtained the required written consent neither detracts nor diminishes the control which this Court exercises over the admission of persons as amici. In *Fose v Minister of Safety and Security*,² this Court held:

“It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an amicus in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the amicus are relevant to the proceedings and raise new contentions which may be useful to the Court. The fact that a person or body has, pursuant to Rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court’s control over the participation of the amicus in the proceedings, because in terms of subrule (3) the terms, conditions, rights and privileges agreed upon between the parties and the person seeking amicus status are subject to amendment by the President.” (footnote omitted)

[9] In the light of this, these subrules cannot be construed to mean that a person who has obtained the required consent is automatically admitted as an amicus. They must be construed to mean that the fact that a person has obtained the written consent contemplated in subrule 10(1) is a factor to be taken into consideration in the exercise

² 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 9.

of the discretion whether or not to admit a person as an amicus. Thus construed, it is implicit, if not explicit, from subrule 10(1) that after obtaining the necessary consent an applicant for admission as an amicus must still make an application to the Chief Justice for admission as an amicus. This will enable a determination to be made as to whether or not the principles governing the admission of a person as an amicus have been satisfied. Were it to be otherwise, it would mean that this Court will be deprived of the control over admission of persons as amici and thus the discretion that it exercises over the admission of an amicus.

[10] Subrule 10(6)(c) requires an application for admission as an amicus curiae to set out the submissions to be advanced, their relevance to the proceedings, the reasons for believing that the submissions would be useful to the Court and different from those of the other parties to the proceedings. It is not always easy to assess these matters from mere allegations in the affidavit in support of an application for admission as amicus. Nor is it possible to assess them from a letter requesting consent to be admitted as amicus curiae. For a proper assessment of these matters to be made, the application for admission as an amicus must ordinarily be accompanied by a summary of the written submissions sought to be advanced. This will enable the Court to assess the application properly and evaluate the submissions sought to be advanced in the light of the principles governing the admission of an amicus. An applicant who fails to comply with this requirement runs the risk of the application being refused if the matters required by subrule 10(6)(c) are not readily ascertainable from the application. This requirement applies equally to a request addressed to the

parties for their consent. The parties must be placed in a position where they can assess properly whether the request complies with the underlying principles governing applications for admission as amicus curiae.

[11] We have dwelt at length on the principles governing the admission of an amicus because we consider it necessary that both the parties to a case and persons seeking to be admitted as amici be familiar with these principles that govern applications for admission of amici. Compliance with these principles will ensure proper assessment of these applications. We are mindful that in the past there has been a tendency to grant consent for the mere asking. Consent should not be given as a matter of course. Parties who are requested to give consent must apply their minds to these principles. The fact that a person was admitted as an amicus in the court below does not in itself give such a person the right to be admitted as amicus in this Court. This judgment must be regarded as a general instruction on how to prepare an application for admission as an amicus.

The application of the legal principles to the facts

[12] The ISS alleged that its submissions will differ from that of the other parties in that they will address:

“12.1 The development of individual criminal responsibility under international law; including, but not limited to, an analysis of when the jurisdiction to prosecute conduct committed abroad was founded for South African courts;

12.2 The development of the duty upon all States, including South Africa, to try or extradite persons responsible for international crimes, and particularly crimes against

humanity and war crimes. Thus, any unlawful acquittal would leave open the possibility of a successful request for extradition in respect of international crimes;

12.3 The legal and political consequences of the failure by South Africa to prosecute and punish international crimes and to cooperate in the detection, arrest, extradition and punishment of persons implicated in these crimes;

12.4 The official position of individuals, as responsible officials in Government Departments, and the absence of immunity for international crimes, more particularly, crimes against humanity and war crimes;

12.5 The extra-territorial effect of amnesties granted such as those granted by the Administrator-General of Namibia, more particularly, the effect of such amnesties in international law and foreign States, as well as the effect of such amnesties in the context of requests for extradition;

12.6 That in light of South Africa's foreign policy commitments, flowing from its membership and leadership of the African Union and its leading role in NEPAD and SADC, the consequences of a failure to give legal effect to prosecution of international crimes."

[13] In its written submissions, the state devoted some sixty pages to addressing crimes under customary international law, crimes against humanity, war crimes and apartheid. In doing so, the state dealt with, among other issues, the history of the recognition of customary international crimes such as crimes against humanity, and war crimes tracing the development of these crimes from the Hague Convention of 1907 Concerning Law and Custom of War on Land, through World War I and World War II, including the Nuremberg Principles of 1950, all the way to the Rome Statute of the International Criminal Court that was adopted in 1998. It also dealt with the implementation of the Rome Statute of the International Criminal Court by the Rome Statute of the International Criminal Court Act 27 of 2002. In addition, the state

referred to a number of international instruments and treatises on international law and international jurisprudence on these issues. It also dealt with the extraterritorial effect of the amnesty granted by the Administrator-General of Namibia.

[14] It was therefore apparent that the central issue that the ISS sought to deal with was canvassed in the written argument of the state. The ISS did not, and could not therefore allege that it would raise new contentions that had not been raised by the parties. To the extent that they were not dealt with, shortly after this application was dismissed, the acting Chief Justice issued further directions calling upon the parties to consider these contentions and lodge further argument on them, if necessary. The other matters were relatively tangential. At the same time it had to be borne in mind that this was an appeal in a criminal matter, in which Dr Basson was already called upon to canvass an extremely wide range of complex legal and factual matters.

[15] As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.

[16] In these special circumstances we did not consider it to be in the interests of justice to admit the applicant as an amicus. In the event, the application for admission as an amicus was refused.

Langa DCJ, Moseneke J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J, Yacoob J.

For the Amicus Curiae: JA Cassette, instructed by Chris Watters Attorneys.

For the respondent: JG Cilliers and MMW Van Zyl, instructed by Adolf Malan and Vermeulen Inc.